Supreme Court, U.S.
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No. ____ OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1997

ROSETTA HILLARY,

Petitioner,

versus

TRANS WORLD AIRLINES, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether this Honorable Supreme Court should grant a writ of certiorari to review apparent conflict between the Circuits on whether to apply federal or state law to the res judicata effect of a prior federal court judgment.

In the alternative, whether this Honorable Supreme Court should grant a writ of certiorari to review the Eighth Circuit Court of Appeals' incorrect application of Louisiana state law for res judicata purposes.

PARTIES TO THE PROCEEDING

Rosetta Hillary

Trans World Airlines, Inc.

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1. *Hillary v. Trans World Airlines, Inc.*, No. 91-1312D(6) (E.D.La. Dec. 2, 1991).

2. *Hillary v. Trans World Airlines, Inc.*, 15 F.3d 180 (5th Cir. 1994) (table) (No. 92-3001), *cert. denied*, 511 U.S. 1128, 114 S.Ct. 2136, 128 L.Ed.2d 865 (1994).

3. *Hillary v. Trans World Airlines, Inc.*, 930 F. Supp. 1332(C)6 (E.D.Mo. 1996).

4. *Hillary v. Trans World Airlines, Inc.*, 123 F.3d 1041 (8th Cir. 1997).

JURISDICTION

Jurisdiction in this Court is founded upon 28 U.S.C. § 171.1(a) and its discretionary authority pursuant to considerations governing review on Writ of Certiorari.

STATUTES INVOLVED

La. Rev. Stat. Ann. § 13:4231 (West 1997):

> Except as otherwise provided by law, a valid and final judgment is conclusive between the same parties, except on appeal or other direct review, to the following extent:
>
> (1) If the judgment is in favor of the plaintiff, all causes of action existing at the time of the final judgment arising out of the transaction or occurrence that is the subject matter of the litigation are extinguished and merged in the judgment.

(2) If the judgment is in favor of the defendant, all causes of action existing at the time of final judgment arising out of the transaction or occurrence that is the subject matter of the litigation are extinguished and the judgment bars a subsequent action on those causes of action.

(3) A judgment in favor of either plaintiff or defendant is conclusive in any subsequent action between them, with respect to any issue actually litigated and determined if its determination was essential to that judgment.

La. Rev. Stat. Ann. § 13:4232 (West 1997):

(1) When exceptional circumstances justify relief from the res judicata effect of the judgment;

(2) When the judgment dismissed the first action without prejudice; or

(3) When the judgment reserved the right of the plaintiff to bring another action.

La. Civ. Code Ann. art 3447 (West 1997):

Liberative prescription is a mode of barring actions as a result of inaction for a period of time.

La. Civ. Code Ann. art 3458 (West 1997):

Peremption is a period of time fixed by law for the existence of a right. Unless timely exercised, the right is extinguished upon the expiration of the peremptive period.

La. Civ. Code Ann. art 3492 (West 1997):

Delictual actions are subject to a liberative prescription of one year. This prescription commences to run from the day injury or damage is

sustained. It does not run against minors or interdicts in actions involving permanent disability and brought pursuant to the Louisiana Products Liability Act or state law governing product liability actions in effect at the time of the injury or damage.

STATEMENT OF THE CASE

In March 1987, Rosetta Hillary (hereinafter "Hillary" or "Petitioner"), suffered injuries to her head and neck resulting from a Trans World Airlines, Inc. (hereinafter referred to as "TWA" or "Respondent") employee striking her on the head with a personal computer as the employee attempted to remove it from an overhead bin. The accident occurred in St. Louis, Missouri, as Mrs. Hillary was required to deplane and change to a connecting flight for travel from St. Louis to New Orleans.

Mrs. Hillary decided to pursue a claim for her injuries and obtained representation with an attorney in St. Louis. After approximately one and one-half years, Petitioner became dissatisfied with counsel, as no suit had been filed and no action had been taken. She then sought representation in her home state.

By the time Petitioner had obtained counsel in Louisiana, the prescriptive period for her claim in that state had expired. Therefore, the only way to protect and litigate Petitioner's claim was to file suit in Louisiana and use the law of Missouri, where the statute of limitations was five years. On April 4, 1991, Petitioner filed suit against TWA for her personal injuries in the United States

District Court for the Eastern District of Louisiana, pursuant to diversity jurisdiction and asserting the applicability of the Missouri statute of limitations.

TWA moved for summary judgment, asserting that Louisiana's one-year prescriptive period barred the claim under La. Civ. Code Ann. art 3492 (West 1997). Because the court applies the law of the forum state to the issue of limitations in a diversity case, Petitioner moved for voluntary dismissal per Fed. R. Civ. P. 41(a)(2). Petitioner then filed suit in the United States District Court for the Eastern District of Missouri to avail herself of Missouri's longer statute of limitations found in Mo. Ann. Stat. § 516.120 (Vernon 1991). Petitioner's claim was not time-barred in Missouri.

In December 1991, the district court in Louisiana granted TWA's motion for summary judgment based on the Louisiana prescriptive period. The court denied Hillary's motion for voluntary dismissal, or transfer, and it dismissed her claims with prejudice.

Petitioner then appealed to the Fifth Circuit Court of Appeals, asserting that a dismissal without prejudice should have been granted because the motion was not filed in bad faith and TWA would suffer no plain legal prejudice as a result since no discovery or any other preparation for litigation had occurred. In January 1994, the Fifth Circuit Court of Appeals affirmed and an application for a writ of certiorari to the United States Supreme Court was denied. *Hillary v. Trans World Airlines, Inc.*, 15 F.3d 180 (5th Cir.) (table) (No. 92-3001), *cert. denied*, 511 U.S. 1128, 114 S.Ct. 2136, 128 L.Ed.2d 865 (1994).

In July 1994, a stay against Petitioner's claim was lifted following TWA's filing for bankruptcy. On July 17, 1996, the United States District Court for the Eastern District of Missouri, in response to TWA's motion for summary judgment, ruled that Petitioner's claim was barred by res judicata. *Hillary v. Trans World Airlines, Inc.*, 930 F. Supp. 1332(C)6 (E.D.Mo. 1996). The Eighth Circuit Court of Appeals affirmed. *Hillary v. Trans World Airlines, Inc.*, 123 F.3d 1041 (8th Cir. 1997).

ARGUMENT

The Eighth Circuit Court of Appeals applies state common law in order to determine the res judicata effect of a prior judgment rendered in federal court under diversity jurisdiction. *Hillary v. Trans World Airlines, Inc.*, 123 F.3d at 1043 (citing *Austin v. Super Valu Stores, Inc.*, 31 F.3d 615, 617 (8th Cir. 1994)). This application, the Eighth Circuit admits, flies in the face of "the majority of circuits" which "have held that the res judicata effect of a federal court judgment in a diversity action is a matter of federal law." *Hillary*, 123 F.3d at 1043.

The Fifth Circuit provides example enough. *See, e.g., Hauser v. Krupp Steel Producers, Inc.*, 761 F.2d 204 (5th Cir. 1985) (citing *Wehling v. Columbia Broadcasting Co.*, 721 F.2d 506, 508 (5th Cir. 1983)). It is established doctrine in the Fifth Circuit that "federal law governs the collateral estoppel effect of an earlier federal judgment, even in diversity cases." *Hauser*, 761 F.2d at 207. Therefore, the

Eighth Circuit Court of Appeals erred in applying Louisiana state law to the res judicata effect of a federal court sitting in diversity.

The Eighth Circuit Court of Appeals hastily, and incorrectly, decided the outcome of Petitioner's case under the federal law of res judicata. See, *Hillary*, 123 F.3d at 1044 n.2. In a footnote, the Court said:

> "Even if the federal law of res judicata applied to this case, Hillary's claim would be barred. Under federal law, the doctrine of res judicata bars litigation of a claim if: '(1) the prior judgment was rendered by a court of competent jurisdiction; (2) the prior judgment was a final judgment on the merits, and (3) the same cause of action and the same parties or their privies were involved in both cases.' (Citations omitted). These three elements are satisfied in the present case."

Id.

Petitioner takes no exception to having satisfied the first and third elements of the federal res judicata test as stated by the *Hillary* court. However, the categorization by the Eighth Circuit that the disposition of Petitioner's claim by the United States District Court for the Eastern District of Louisiana constitutes "a final judgment on the merits" shocks the conscience and undermines the sense of justice.

Petitioner filed a Suit for Damages in the United States District Court for the Eastern District of Louisiana on April 4, 1991. *Hillary v. Trans World Airlines, Inc.*, No. 91-1312D(6) slip op. at 1, (E.D.La. Dec. 2, 1991). The Court

then ruled that Hillary's claim is time-barred in Louisiana, but that its "ruling does not reach the merits of Plaintiff's claim, and this court expresses no opinion as to whether this matter can now be litigated in some other forum that does not apply the Louisiana prescriptive period." *Id.* slip op. at 2-3.

The First Circuit Court of Appeals restated the proper federal doctrine of res judicata in "abecedarian" terms. *Kale v. Combined Ins. Co. of America*, 924 F.2d 1161, 1165 (1st Cir. 1991). At issue was the disposition of the plaintiff's Age Discrimination in Employment Act claims in federal and state law claims. *Id.* 924 F.2d at 1163. His claims were dismissed, *id.*, and he took no further action to preserve them. *Id.* at 1164. On appeal, the First Circuit held "there was a final judgment [. . .] comprising an adjudication on the merits for purposes of claim preclusion." *Id.* at 1165.

Unlike the plaintiff in *Kale, supra*, Petitioner took immediate and prophylactic action by filing in The United States District Court for the Eastern District of Missouri. *Hillary*, 123 F.3d at 1042. Her cause of action was still viable under the five year Missouri statute of limitations. *Id.* For the Eighth Circuit Court of Appeals to bar Petitioner's claim because of a rigid and narrow-minded application of the doctrine of res judicata to preclude a viable claim in an appropriate jurisdiction works massive prejudice to our notion of justice. In other, and more eloquent, words:

> "Res judicata is a sound and salutary principle that deserves to be respected and applied. But at times there is considerable truth in the observation that res judicata renders white black, the

> crooked straight. [. . .]. A little flexibility in application can make a common sense accommodation of a sound principle to the particular facts without sacrifice of the principle and with greater justice to all concerned."

United States v. LaFatch, 565 F.2d 81, 84 (6th Cir. 1977) (citing 1B J. Moore, Federal Practice, para. 0.405[12] (1974) (footnotes omitted)).

Should this Honorable Supreme Court determine that The Eighth Circuit Court of Appeals applied the appropriate law in determining the res judicata effect of the original forum's judgment "when the original judgment is that of another federal court sitting in diversity", Petitioner contends that the Eighth Circuit Court of Appeals incorrectly applied the law of Louisiana.

On December 2, 1991, the United States District Court for the Eastern District of Louisiana, *Hillary v. Trans World Airlines, Inc.*, No. 91-1312D(6), slip op. at 3 (E.D.La. Dec. 2, 1991), granted TWA's motion for summary judgment and dismissed Hillary's action "with prejudice in *this* court" (emphasis added). The Eastern District's dismissal with prejudice addressed the "narrow issue" of whether or not Hillary's claim had prescribed in Louisiana, *id.* at 2, and "express[ed] no opinion as to whether this matter can [. . .] be litigated in some other forum that does not apply the Louisiana prescriptive period." *Id.* at 3. Therefore, the Eighth Circuit Court of Appeals incorrectly concluded that the decision of the United States District Court for the Eastern District of Louisiana constituted a final judgment for res judicata purposes. See, *supra*.

In the alternative, even if the decision in the Louisiana case were intended to serve as a final judgment for res judicata purposes, the Eighth Circuit Court of Appeals incorrectly applied Louisiana (state) law. The applicable statute governing res judicata in Louisiana is Louisiana Revised Statute § 13:4231. It states:

> Except as otherwise provided by law, a valid and final judgment is conclusive between the same parties, except on appeal or other direct review, to the following extent:
>
> (1) If the judgment is in favor of the plaintiff, all causes of action existing at the time of the final judgment arising out of the transaction or occurrence that is the subject matter of the litigation are extinguished and merged in the judgment.
>
> (2) If the judgment is in favor of the defendant, all causes of action existing at the time of final judgment arising out of the transaction or occurrence that is the subject matter of the litigation are extinguished and the judgment bars a subsequent action on those causes of action.
>
> (3) A judgment in favor of either plaintiff or defendant is conclusive in any subsequent action between them, with respect to any issue actually litigated and determined if its determination was essential to that judgment.

La. Rev. Stat. Ann. § 13:4231 (West 1997).

Louisiana grants three exceptions to the doctrine of res judicata. La. Rev. Stat. Ann. § 13:4231 (West 1997). These exceptions are:

> (1) When exceptional circumstances justify relief from the res judicata effect of the judgment;
>
> (2) When the judgment dismissed the first action without prejudice; or
>
> (3) When the judgment reserved the right of the plaintiff to bring another action.

La. Rev. Stat. Ann. § 13:4232 (West 1997).

Petitioner concedes that the decision of the United States District Court for the Eastern District of Louisiana constituted a dismissal of the action with prejudice and that the second exception to the application of res judicata does not here apply. See, La. Rev. Stat. Ann. § 13:4231(2); *see also Hillary v. Trans World Airlines, Inc.*, No. 91-1312D(6), slip op. at 3 (E.D.La. Dec. 2, 1991). However, that court affirmatively stated that it was limiting its decision to Petitioner's filing in Louisiana and not "in some other forum that does not apply the Louisiana prescriptive period." *Id.* slip op. at 2-3. The decision of the Louisiana court reserved Petitioner's right to bring another action pursuant to La. Rev. Stat. Ann. § 13:4231(3). This is precisely what Petitioner did in November 1991. See, *supra*.

Petitioner further contends that the Eighth Circuit Court of Appeals incorrectly interpreted Louisiana law concerning what constitutes "exceptional circumstances" for the purposes of avoiding the res judicata effect of the Judgment of the United States District for the Eastern District of Louisiana's judgment. *Hillary v. Trans World Airlines, Inc.*, 123 F.3d 1041, 1044-46 (8th Cir. 1997). Specifically, Petitioner contends that the Eighth Circuit Court

of Appeals erred in its finding that the filing in Louisiana of Petitioner's original cause of action, *Hillary v. Trans World Airlines, Inc.*, No. 91-1312D(6) (E.D.La. Dec. 2, 1991), did not constitute the "exceptional circumstances" contemplated by La. Rev. Stat. Ann. § 13:4232(1).

The Eighth Circuit Court of Appeals relies upon *Centanni v. Ford Motor Co.*, 636 So.2d 1153 (La.App.3 Cir.), *writ denied*, 644 So.2d 656 (La.1994) to determine that Petitioner has not suffered from "exceptional circumstances". *Hillary*, 123 F.3d at 1044. In that case, the Plaintiff, Centanni, was injured in an automobile accident and filed suit in Jefferson Parish and Lafourche Parish. Centanni's claims against his employer were dismissed and venue in Lafourche was lost as to Ford. Upon Centanni's refiling in Jefferson, Ford filed an exception to prescription. *Id.* at 1154-55. The exception was granted, and Centanni's claims were dismissed with prejudice. *Id.* at 1155.

The Court of Appeals of Louisiana for the Third Circuit determined that the doctrine of res judicata applied to Centanni's claims against Ford in Jefferson Parish and that none of the 13:4232 exceptions could salvage them. *Id.* at 1155. The Court likened 13:4232(A)(1) to a "safety net", *id.* at 1156, but one that cannot be deployed unless the party against whom res judicata is operating has taken the requisite steps to preserve its claims: i.e., "apply for a new trial, file an appeal, or seek a nullity of judgment, [. . .]". *Id.* Nevertheless, should the party be the victim of "horrendous injustice", 13:4232(A)(1) would still apply. *Id.* at 1155 (citing *Jenkins v. State*, 615 So.2d 405, 406-407 (La.App.4th Cir.), *writ denied*, 617 So.2d 932 (La.1993).

Crucial to the Eighth Circuit Court of Appeals' rejection of Petitioner's claim is its improper interpretation of *Jenkins*. In that case, suit was filed in Civil District Court for the Parish of Orleans for damages stemming from Plaintiff's allegedly "fraudulent conviction" and "wrongful incarceration for thirty years". *Id.* 615 So.2d at 406. Plaintiff's claims, rejected for failure to prosecute, *id.* at 406, were eventually salvaged by resort to 13:4232(A)(1):

> According to the official comment on the statute it is designed to allow the court to balance the principle of res judicata with the interests of justice. In the present case, plaintiff alleges that he has been the victim of a horrendous injustice. His interest in proceeding with the law suit outweighs any interest in the strict application of res judicata, *especially considering that his predicament is the result of his attorney's conduct and not his own.*"

Id. at 406-407 (emphasis added).

In order to appreciate the import of the resuscitation of Jenkins' claim, one must understand the difference in Louisiana between prescription and peremption. The Louisiana Civil Code states that "delictual actions (tort actions) are subject to a liberative prescription of one year [. . .] from the day injury or damage is sustained." La. Civ. Code Ann. art 3492 (West 1997). We see that " 'liberative prescription' is a mode of barring actions as a result of inaction for a period of time." La. Civ. Code Ann. art 3447 (West 1997). While the running of prescription may bar an action, it does not nullify the underlying obligation upon which the action is founded. Marjorie Nieset

Neufeld, *Prescription and Peremption – The 1982 Revision of the Louisiana Civil Code*, 58 Tul. L. Rev. 593, 605 (1983).

The preservation of the underlying action may seem small solace to an untimely plaintiff. When compared to the iron hand of peremption, however, prescription resembles more and more a velvet glove. The passage of peremption, "the period of time fixed by law for the existence of a right", destroys the action to which the right attaches. La. Civ. Code Ann. art 3458 (West 1997). Peremption is thus an absolute bar to proceeding with a claim and may be raised by the trier of fact *sua sponte*. La. Civ. Code Ann. art 3460 (West 1997).

Petitioner's filing in the United States District Court for the Eastern District of Louisiana occurred after prescription had run. See, *supra*. That court dismissed the action, but its statement that it made no ruling as to Petitioner's claim in a jurisdiction with a longer period of prescription is plain evidence that Petitioner's right to proceed with the action had prescribed and had not been perempted.

Jenkin's failure to prosecute did, on the other hand, invoke peremption. See, La. Civ. Code Ann. art 561 (West 1997); *see, also, American Eagle, Inc. v. Employer's Liability Assurance Corp., Ltd.*, 385 So.2d 1339, 1341 (La.App. 1 Cir. 1980). That his claim was resuscitated even after peremption had been invoked because of attorney error created a situation of "horrendous injustice". *Jenkins*, 615 So.2d at 406. It is this crucial failure to appreciate the difference between the particularly civil concepts of prescription

and peremption that caused the Eighth Circuit Court of Appeals to reject Petitioner's claim.

CONCLUSION

For the above mentioned reasons, the Eighth Circuit Court of Appeals should follow the lead of the other circuits and apply federal law to the application of res judicata to decisions rendered in federal district courts sitting in diversity. In particular, the Eighth Circuit's ham-fisted dismissal of this established doctrine has denied Petitioner the ability to exercise a valid claim under Missouri law because her suit was filed and time-barred in Louisiana.

In the alternative, the Eighth Circuit incorrectly applied the law of the original forum (Louisiana) and failed to save Petitioner's claim under established Louisiana exceptions to res judicata. Despite the fact that TWA incurred no costs of litigation and that no discovery was ever attempted, it would suffer no legal prejudice by being required to answer her claim in Missouri. Further, Petitioner acted in good faith and timely filed suit in Missouri in advance of the United States District Court for the Eastern District of Louisiana's decision.

Therefore, Petitioner respectfully requests that this Honorable Supreme Court grant this Writ and acknowledge the error of the Eighth Circuit and the District Court

by reversing their holdings and allow her to proceed with her claim in Missouri.

Respectfully submitted,

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APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 96-3131

Rosetta Hillary,	*	
Appellant,	*	Appeal from the United States District Court for the Eastern District of Missouri
v.	*	
Trans World Airlines, Inc.,	*	
Appellee.	*	

Submitted: April 17, 1997

Filed: August 20, 1997

Before McMILLIAN, JOHN R. GIBSON and BEAM, Circuit Judges.

McMILLIAN, Circuit Judge.

Rosetta Hillary appeals from a final order entered in the United States District Court[1] for the Eastern District of Missouri granting summary judgment in favor of defendant Trans World Airlines, Inc. ("TWA"), and dismissing her complaint against TWA. *Hillary v. Trans World Airlines, Inc.*, No. 91-2261(C)6 (E.D.Mo. July 17, 1996) (order and judgment of the district court) (hereinafter

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[1] The Honorable George F. Gunn, Jr., United States District Judge for the Eastern District of Missouri.

"slip op."). For reversal, Hillary argues that the district court misapplied the Louisiana law of res judicata. For the reasons discussed below, we affirm the judgment of the district court.

I. BACKGROUND

The underlying facts are as follows. On March 16, 1987, Hillary was a passenger on a TWA flight traveling from Los Angeles, California, to New Orleans, Louisiana. According to Hillary's complaint, during a stopover in St. Louis, Missouri, a TWA employee dropped a metal case containing a typewriter on Hillary's head. Slip op. at 1. Hillary allegedly suffered injuries to her head, neck, back, hearing, and eyesight. *Id.* Nearly four years later, on April 5, 1991, Hillary filed a complaint against TWA in the United States District Court for the Eastern District of Louisiana. Jurisdiction was based on 28 U.S.C. § 1332, diversity of citizenship.

In September 1991, TWA moved for summary judgment on the basis that Hillary's claim was barred by Louisiana's one year statute of limitations. Hillary opposed TWA's motion and, in the alternative, moved for voluntary dismissal of the complaint without prejudice pursuant to Fed.R.Civ.P. 41(a)(2). On November 5, 1991, Hillary filed an identical complaint in the United States District Court for the Eastern District of Missouri, where the applicable Missouri statute of limitations period is five years. On November 27, 1991, the district court in Louisiana granted TWA's motion for summary judgment on the ground that the action was time-barred under Louisiana law. *Hillary v. Trans World Airlines, Inc.*, No.

91-1312D(6), slip op. at 2 (E.D.La. Dec. 2, 1991). The district court in Louisiana further denied Hillary's motion for voluntary dismissal without prejudice, *id.* at 3 (citing *Phillips v. Illinois Cent. Gulf R.R.*, 874 F.2d 984 (5th Cir.1989)), and final judgment was entered dismissing Hillary's claim with prejudice. *Id.* In January 1994, the United States Court of Appeals for the Fifth Circuit, in an unpublished opinion, affirmed the Louisiana district court's grant of summary judgment in favor of TWA, the denial of Hillary's motion for voluntary dismissal without prejudice, and the dismissal of Hillary's claim with prejudice. *Hillary v. Trans World Airlines, Inc.*, 15 F.3d 180 (5th Cir.) (table) (No. 92-3001), *cert. denied*, 511 U.S. 1128 (1994).

In December 1991, TWA filed a motion to dismiss or, in the alternative, for summary judgment in the district court in Missouri on the basis that Hillary's claim was barred by the doctrine of res judicata, or "claim preclusion." Thereafter, TWA filed for bankruptcy, and the district court in Missouri entered an order staying Hillary's action. *Hillary v. Trans World Airlines, Inc.*, No. 91-2261C(6) (E.D. Mo. June 10, 1992). In July 1994, the stay was lifted, and TWA renewed its motion to dismiss or, in the alternative, for summary judgment. On July 17, 1996, the district court in Missouri granted TWA's motion for summary judgment on the ground of res judicata, holding that, under Louisiana law, a dismissal based on a plea of prescription (i.e. the statute of limitations) is a final judgment for res judicata purposes. This appeal followed.

II. DISCUSSION

"We review the district court's grant of summary judgment de novo, applying the same standards and affirming only when the record shows that there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law." *Reliance Ins. Co. v. Shenandoah South, Inc.*, 81 F.3d 789, 791 (8th Cir.1996) (citing Fed.R.Civ.P. 56(c), and *Johnson v. Group Health Plan, Inc.*, 994 F.2d 543, 545 (8th Cir.1993)). We view the record in the light most favorable to the non-moving party. *Marshall v. UNUM Life Ins. Co.*, 13 F.3d 282, 283 (8th Cir.1994) (citations omitted).

Hillary argues that the preclusive effect of the judgment of the district court in Louisiana is a matter of Louisiana state law because the case was based on diversity jurisdiction. By contrast, TWA contends that federal law applies to determine the preclusive effect of the judgment. Additionally, Hillary contends that the district court in Missouri should have applied a Louisiana equitable res judicata rule which grants relief from res judicata in "exceptional circumstances" such as attorney error. Hillary also argues that the district court in Louisiana erroneously denied her motion to voluntarily dismiss without prejudice because a separate and identical lawsuit had already been timely filed in Missouri.

Although the majority of circuits have held that the res judicata effect of a federal court judgment in a diversity action is a matter of federal law, "cases from this circuit have consistently concluded that [the res judicata or] collateral estoppel [effect of a prior judgment] in a

diversity action is a question of substantive law controlled by state common law." *Austin v. Super Valu Stores, Inc.*, 31 F.3d 615, 617 (8th Cir.1994) (quoting *Lane v. Sullivan*, 900 F.2d 1247, 1250 (8th Cir.) (citations omitted), *cert. denied*, 498 U.S. 847 (1990)). "This Court has consistently looked to state law to determine the effect of the judgment of another federal court in a case where state law supplied the rule of decision. This rule applies when the original judgment is that of another federal court sitting in diversity." *Follette v. Wal-Mart Stores, Inc.*, 41 F.3d 1234, 1237 (8th Cir.1994) (citations omitted), *cert. denied*, 116 S.Ct. 66 (1995). In determining which state's res judicata law applies, "it is fundamental that the res judicata effect of the first forum's judgment is governed by the first forum's law, not by the law of the second forum." *Selmer v. Psychiatric Inst. of Washington, D.C., Inc.*, 575 F.2d 922, 930 (D.C.Cir.1978) (citing Restatement (Second) Conflicts of Laws § 95 cmt. e (1971)); *see also Austin v. Super Valu Stores, Inc.*, 31 F.3d at 618. Thus, in the present case, Louisiana law determines the preclusive effect to be given to the dismissal with prejudice of Hillary's prior identical action in the federal district court in Louisiana.[2]

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[2] Even if the federal law of res judicata applied to this case, Hillary's claim would be barred. Under federal law, the doctrine of res judicata bars litigation of a claim if: "(1) the prior judgment was rendered by a court of competent jurisdiction; (2) the prior judgment was a final judgment on the merits, and (3) the same cause of action and the same parties or their privies were involved in both cases." *Lane v. Peterson*, 899 F.2d 737, 742 (8th Cir.) (citing *Murphy v. Jones*, 877 F.2d 682, 684 (8th Cir.1989)), *cert. denied*, 498 U.S. 823 (1990). These three elements are satisfied in the present case.

Under the Louisiana law of claim preclusion, all actions arising from the same "transaction or occurrence" that is the subject matter of a prior final judgment are barred. La.Rev.Stat. Ann. § 13:4231 (West 1997); *see also Follette v. Wal-Mart Stores, Inc.*, 41 F.3d at 1237; *Centanni v. Ford Motor Co.*, 636 So.2d 1153, 1155 (La.Ct.App.), *writ denied*, 644 So.2d 656 (La.1994). "The grant of a peremptory exception of prescription constitutes a final judgment." *Centanni v. Ford Motor Co.*, 636 So.2d at 1155. In other words, a dismissal based upon the expiration of the statute of limitations constitutes a final judgment for res judicata purposes under Louisiana law. *See Loew v. Rivers*, 445 So.2d 105 (La.Ct.App.1984). "The defense of the statute of limitations is not a technical defense but substantial and meritorious. . . . [and] a decree dismissing a bill on the ground of lapse of time [is] a judgment upon the merits." *United States v. Oregon Lumber Co.*, 260 U.S. 290, 299-300 (1922) (citations omitted); *see also Guidry v. Bayly, Martin & Fay of Louisiana, Inc.*, 545 So.2d 567, 570-71 (La.Ct.App.), *writ denied*, 551 So.2d 638 (La.1989); *Loew v. Rivers*, 445 So.2d at 107. Both the cause of action and the parties involved in the Missouri case are identical to those in the Louisiana case. The cause of action in Missouri arises from the "same transaction or occurrence" as the previous case in Louisiana. Therefore, the district court's final judgment in Louisiana precludes the Missouri case.

However, Louisiana law permits exceptions to the general rule of res judicata; in particular, a judgment does not bar another action when "exceptional circumstances" justify relief from the res judicata effect of the judgment.

La.Rev.Stat. Ann. § 13:4232(A)(1)[3]; *see, e.g., Fine v. Regional Transit Auth.*, 676 So.2d 1134 (La. Ct. App.1996) (exception to res judicata established when plaintiff was unaware his insurer previously filed subrogation suit, plaintiff never received proceeds, and insurer took no steps to reserve plaintiff's potential claim); *Ballex v. Naccari*, 657 So.2d 511, 513 (La.Ct.App.1995) (exception to res judicata established when defendant in a sexual harassment suit filed a counterclaim for defamation based on allegations in plaintiff's original petition for damages). The "exceptional circumstances" exception is similar to Fed.R.Civ.P. 60(b) and was designed "to allow the court to balance the principle of res judicata with the interests of justice. This discretion must be exercised on a case by case basis and such relief should be granted only in truly exceptional cases, otherwise the purpose of res judicata would be defeated." La.Rev.Stat. Ann. § 13:4232 comment (1990).

Hillary argues that such "exceptional circumstances" exist in this case to justify departure from the general rule of res judicata. Hillary argues that her attorney erroneously filed suit in Louisiana, and she should not be

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[3] La.Rev.Stat. Ann. § 13:4232, "Exceptions to the general rule of res judicata," states in relevant part:

> A. A judgment does not bar another action by the plaintiff:
>
> (1) When exceptional circumstances justify relief from the res judicata effect of the judgment;
>
> (2) When the judgment dismissed the first action without prejudice; or
>
> (3) When the judgment reserved the right of the plaintiff to bring another action.

punished for the errors of her attorney. Hillary maintains that she attempted to correct the attorney error by moving to dismiss the suit in Louisiana without prejudice and then timely filing suit in Missouri. Hillary also argues that the district court in Louisiana and the Fifth Circuit Court of Appeals erroneously denied her motion to dismiss without prejudice.

Hillary's "exceptional circumstances" argument appears for the first time on appeal, and thus the issue is waived by her failure to raise it in the district court. *See United States v. Bentley,* 82 F.3d 222, 223 (8th Cir.1996); *Standing Bear v. United States,* 68 F.3d 271, 272 (8th Cir.1995), *cert. denied,* 116 S.Ct. 1444 (1996). Even if the issue had been raised in the district court, no such "exceptional circumstances" exist in this case to depart from the general rule of res judicata.

Hillary relies on *Jenkins v. State,* 615 So.2d 405, 406-07 (La.Ct.App.), *writ denied,* 617 So.2d 932 (La.1993), to support her argument that attorney error justifies applying the "exceptional circumstances" exception. In *Jenkins,* the plaintiff's action for damages for fraudulent conviction of murder and wrongful incarceration for thirty years was dismissed for failure to prosecute. The plaintiff filed the original action in Louisiana state court only to have it removed to federal court. Thereafter, the plaintiff filed a second identical action in Louisiana state court, and filed a motion in the federal district court to remand the first suit back to the state court. The federal district court denied the motion and only eight days later dismissed the action for failure to prosecute. The plaintiff's attorney failed to appeal the judgment of the federal district court dismissing the plaintiff's action. The Louisiana state court

did not give preclusive effect to the federal district court judgment and the Louisiana Court of Appeals affirmed. The *Jenkins* court stated "[the plaintiff's] interest in proceeding with the lawsuit outweighs any interest in the strict application of res judicata, especially considering that his predicament is the result of his attorney's conduct not his own." *Id.* The court reasoned that the plaintiff had been the victim of "horrendous injustice" requiring relief from the principle of res judicata. *Id.*

Unlike *Jenkins,* this case presents no "horrendous injustice" resulting from a highly unusual or convoluted factual or legal scenario. *See Centanni v. Ford Motor Co.,* 636 So.2d at 1155. Hillary's attorney evidently misunderstood the applicable law and consequently filed the original suit in federal district court in Louisiana rather than federal district court in Missouri. This attorney error is not the kind of "exceptional circumstances" justifying departure from the general law of res judicata. "[La.Rev.Stat. Ann. §] 13:4232(A)(1) is designed to protect those drawn into error by an awkward factual or legal scenario, not by those who can allude to no circumstance to justify [their actions]." *Centanni v. Ford Motor Co.,* 636 So.2d at 1155; *see, e.g., Follette v. Wal-Mart Stores, Inc.,* 41 F.3d at 1238 (holding awkward legal scenario constituting "exceptional circumstances" under La.Rev.Stat. Ann. § 13:4232(A)(1) existed when the underlying suit was dismissed due to an error of the federal court in Texas in case involving "highly unusual interplay of transfer and jurisdictional doctrines").

Finally, Hillary contends that the denial of her motion to voluntarily dismiss without prejudice by the Louisiana district court and the decision of the Fifth

Circuit affirming the judgment were incorrect, and thus constitute "exceptional circumstances" for the purpose of La.Rev.Stat. Ann. § 13:4232(A)(1). We do not have the power to review the decisions of the district court in Louisiana, much less those of the Fifth Circuit Court of Appeals. 28 U.S.C. § 1294 (1993). However, we can examine another court's decision to determine whether "exceptional circumstances" existed for purposes of applying La.Rev.Stat. Ann. § 13:4232(A)(1). This court, in *Follette v. Wal-Mart Stores, Inc.*, considered the correctness of a judgment of a Texas court for precisely that reason and held that there were exceptional circumstances because of an "unusual error of the court." 41 F.3d at 1238 (noting the Texas court incorrectly transferred the suit to the Louisiana jurisdiction where the Louisiana limitations period applied and had expired). In this case, the district court in Louisiana and the Fifth Circuit Court of Appeals made no errors, much less any "unusual errors," in the application of the law of Louisiana. Applying its own precedent, the Fifth Circuit held that the district court did not abuse its discretion in denying Hillary's motion to dismiss without prejudice because, absent a dismissal with prejudice, TWA would have suffered clear legal prejudice – the loss of its statute of limitations defense. *Hillary v. Trans World Airlines, Inc.*, No. 92-3001, slip op. at 4-5.

III. CONCLUSION

We agree with the district court that the dismissal on statute of limitations grounds entered by the district

court in Louisiana was final, with prejudice, and constituted an adjudication on the merits for res judicata purposes under Louisiana law.

Accordingly, the judgment of the district court is affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

ROSETTA HILLARY, Plaintiff(s),	)	
vs.	)	No. 91-2261(C)6
TRANS WORLD AIRLINES, INC., Defendant(s).	)	

MEMORANDUM

(Filed Jul. 17, 1996)

This matter is before the Court on defendant Trans World Airline's ("TWA") renewed motion to dismiss or in the alternative for summary judgment. Document 18. Plaintiff Rosetta Hillary has responded to the renewed motion. Document 20. The parties have also filed supplemental memoranda. Documents 22, 23. For the reasons set forth below, TWA's motion is **GRANTED.**

I. BACKGROUND

Plaintiff filed this action on November 5, 1991, alleging that she was injured on March 16, 1987, while she was a passenger on a TWA flight from Los Angeles, California to New Orleans, Louisiana. Document 3. According to the complaint, the injury occurred during a stop in St. Louis, when a TWA employee negligently dropped a metal case containing a typewriter on plaintiff's head. *Id.* Plaintiff alleged that she suffered injuries to her head, neck, and

back and suffered loss of hearing and damage to her eyesight. *Id.*

On December 20, 1991, TWA moved to dismiss or in the alternative for summary judgment on the ground of res judicata. Document 7. In support of the motion, TWA asserted that on April 5, 1991, plaintiff filed an identical claim against TWA arising from the same incident in the United States District Court for the Eastern District of Louisiana and attached a copy of the complaint to its motion. *Id.*, Exh. 1. TWA moved for summary judgment in the Louisiana action, arguing that plaintiff's claim was barred by Louisiana's one-year statute of limitations. In response to TWA's motion, plaintiff filed this action and moved for voluntary dismissal without prejudice of the Louisiana complaint pursuant to Fed. R. Civ. P. 41(a)(2). Document 20, Exhs. F, G. On December 2, 1991, the District Court in Louisiana granted TWA's motion, concluding that plaintiff's complaint was barred by the statute of limitations, and dismissed the action with prejudice. Document 7, Exhs. 2-3. The Court denied plaintiff's motion for voluntary dismissal without prejudice under Fed. R. Civ. P. 41(a)(2) because such action would deprive TWA of a valid statute of limitations defense. *Id.*, Exh. 3 at 2.

In response to TWA's motion in this case, plaintiff argued that the order dismissing the Louisiana action as time-barred is not entitled to res judicata effect here because a statute of limitations defense is procedural in nature rather than substantive. Document 8. Plaintiff also noted that the Louisiana Court's order stated that it had not considered the merits of plaintiff's claims and that Court had expressed no opinion "as to whether this matter can now be litigated in some other forum that does

not apply the Louisiana prescriptive period." *Id.*, exh. 1 at 2-3.

Thereafter, TWA filed a suggestion of bankruptcy, Document 10, and this Court entered an order staying the action pending further order of Court. Document 11. The Court subsequently entered an order denying TWA's pending motion without prejudice to its refiling after the lifting of the bankruptcy stay. Document 12. On July 7, 1994, TWA notified the Court that the bankruptcy stay had been lifted and that TWA's motion for summary judgment was still pending. Document 13. On July 12, 1994, counsel for plaintiff submitted a letter to the Court indicating that he had spoken with defense counsel regarding a stipulation allowing this case to go forward and had asked defense counsel to refile the motion for summary judgment pending execution of the stipulation. Document 14.

Neither party took any further action until this Court issued an order on January 3, 1996, requiring plaintiff to show cause why the case should not be dismissed for failure to prosecute. Document 15. Plaintiff filed a response to the order, Document 16, and TWA replied, re-urging its motion to dismiss or in the alternative for summary judgment. Document 18. TWA attached to its reply the unpublished decision of the United States Court of Appeals for the Fifth Circuit, affirming the District Court's grant of summary judgment in favor of TWA in the Louisiana action. *Id.*, Exh. 2. Plaintiff filed a supplemental response to the Court's show cause order opposing TWA's renewed motion. Document 20. The parties have since filed supplemental memoranda, and the matter is ripe for decision.

II. DISCUSSION

The Court Will treat TWA's motion as one for summary judgment because matters outside the pleadings have been presented to and not excluded by the Court. *See* Fed. R. Civ. P. 12(b). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986).

TWA contends that it is entitled to judgment as a matter of law on the ground of res judicata. The underlying facts are not in dispute. The only issue before the Court, therefore, is whether the dismissal of plaintiff's identical lawsuit by the District Court in Louisiana bars plaintiff's claim here.

The preclusive effect to be given to the dismissal of plaintiff's prior, identical action must be determined by reference to Louisiana law. *See Austin v. Super Valu Stores, Inc.*, 31 F.3d 615, 617-19 (8th Cir. 1994). Under current Louisiana law, all actions arising from the same transaction or occurrence that is the subject matter of a prior final judgment are barred. La. Rev. Stat. § 13:4231; *Follette v. Wal-Mart Stores, Inc.*, 41 F.3d 1234, 1237 (8th Cir. 1994), *on reh'g*, 47 F.3d 311 (8th Cir.), *cert. denied*, 116 S. Ct. 66 (1995). "A valid, final judgment in favor of the defendant is conclusive between the parties. It extinguishes all causes of action arising from the same transaction or

occurrence that is the subject matter of the suit. . . ." *Centanni v. Ford Motor Co.*, 636 So.2d 1153, 1155 (La. Ct. App.), *writ denied*, 644 So.2d 656 (La. 1994). Louisiana courts have held that a dismissal based on a plea of prescription (the statute of limitations) is a final judgment for res judicata purposes. *See id.; Guidry v. Baly, Martin & Fay, of Louisiana, Inc.*, 545 So.2d 567, 569-70 (La. Ct. App.), *writ denied*, 551 So.2d 638 (La. 1989).

The Eighth Circuit's decision in *Austin* is instructive. There, the plaintiff commenced a personal injury action based on diversity jurisdiction in the United States District Court for the Eastern District of Louisiana. The District Court dismissed the action on the ground that it was barred by Louisiana's one-year statute of limitations. Thereafter, the plaintiff commenced an action in the United States District Court for the District of Minnesota against the same defendants. 31 F.3d at 616. The District Court in Minnesota dismissed on the ground of res judicata, and the Eighth Circuit affirmed. *Id.* at 617-20.[1]

The facts here are virtually indistinguishable from Austin. Plaintiff commenced her first action against TWA in federal court in Louisiana based on diversity jurisdiction. After TWA moved for summary judgment on the ground that the complaint was barred by the Louisiana

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[1] *Austin* applied the civil law of res judicata because the action was filed before January 1, 1991. 31 F.3d at 619. Civil law res judicata is perceived to be much narrower in scope than common law res judicata. *Id.* Louisiana amended its law of res judicata in 1990, and it is now similar to common law res judicata. *Id.* at 619 n.6. The amended, broader version of res judicata applies to this action.

statute of limitations, plaintiff filed this identical action against TWA based on the same incident. The United States District Court for the Eastern District of Louisiana granted TWA's motion for summary judgment and dismissed the action with prejudice on December 5, 1991. That final, valid judgment is now conclusive between the parties under Louisiana law. *See Centanni*, 636 So.2d at 1155. This Court must, therefore, give preclusive effect to that judgment. *See Austin*, 31 F.3d at 618-20.

Plaintiff contends that a different result must be reached here because she filed her suit in Missouri before the case in Louisiana was dismissed. The Court does not agree. A somewhat similar factual situation arose in *Centanni*. There, the plaintiff simultaneously filed identical actions in two different Louisiana state courts – Lafourche and Jefferson Davis Parishes. The plaintiff proceeded with the Lafourche Parish case and did not serve the defendant with the lawsuit filed in Jefferson Davis Parish. The Lafourche Parish suit was subsequently transferred to another parish, where it was dismissed with prejudice as barred by the statute of limitations. The plaintiff then sought to "awaken the long dormant and never served" Jefferson Davis Parish action. *Centanni*, 636 So.2d at 1154-55. The trial court granted the defendant's motion to dismiss, giving res judicata effect to the prior dismissal. *Id.* at 1155. The appellate court affirmed the dismissal, stating that "[w]here identical suits are filed in separate jurisdictions . . . the plaintiff may continue the prosecution of any of the suits, but the first final judgment rendered shall be conclusive of all." *Id.* at 1155 (internal quotations and citations omitted).

Finally, plaintiff argues that the United States Court of Appeals for the Seventh Circuit rejected a similar res judicata argument in *Reinke v. Boden*, 45 F.3d 166 (7th Cir.), *cert. denied*, 116 S. Ct. 74 (1995). After careful review, however, the Court concludes that *Reinke* does not support plaintiff's position. *Reinke* held that a federal court in Illinois erred by giving preclusive effect to a Minnesota state court's dismissal of an action as barred by that state's statute of limitations. *Id.* at 173. *Reinke* distinguished between the res judicata effect of dismissals based on a statute of limitations within one court system (intrasystem dismissals), and the res judicata effect of such dismissals on courts outside of the system in which the dismissal occurred (intersystem dismissals). *Id.* at 171. The Court acknowledged the existence of a line of cases holding that when successive actions are brought in different federal courts, a determination by the first federal court that the action is barred by the statute of limitations of one state bars a successive action in a second federal court. *Id.* at 170. The Court categorized these cases as intrasystem dismissals and noted that "[a]n intrasystem use of res judicata for dismissals on the ground of the expiration of a statute of limitations promotes judicial economy within that system." *Id.* at 171. This case, unlike Reinke, involves an intrasystem use of res judicata of a dismissal rendered by a federal court based on the Louisiana statute of limitations.

III. CONCLUSION

Accordingly, based on the foregoing, the Court concludes that TWA's motion for summary judgment must be

granted. The Court will issue a separate order and judgment dismissing this case.

Dated this 17th day of July, 1996.

/s/ George F. Gunn, Jr.
GEORGE F. GUNN, JR.
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

ROSETTA HILLARY,	)	
Plaintiff(s),	)	
vs.	)	**No. 91-2261(C)6**
TRANS WORLD AIRLINES, INC.,	)	
Defendant(s).	)	

ORDER AND JUDGMENT

(Filed Jul. 17, 1996)

Pursuant to the memorandum filed herewith and incorporated herein,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that defendant's renewed motion to dismiss or in the alternative for summary judgment, Document 18, is **GRANTED.**

Dated this 17th day of July, 1996.

/s/ George F. Gunn, Jr.
GEORGE F. GUNN, JR.
UNITED STATES DISTRICT JUDGE

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

May 31, 1994

Mr. Lawrence D. Wiedemann
Wiedemann & Wiedemann
821 Baronne Street
New Orleans, LA 70113

Re: Rosetta Hillary
v. Trans World Airlines, Inc.
No. 93-1593

Dear Mr. Wiedemann:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is denied.

Very truly yours,

/s/ William K. Suter
William K. Suter, Clerk

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-3001
Summary Calendar

ROSETTA HILLARY,

Plaintiff-Appellant,

VERSUS

TRANS WORLD AIRLINES, INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Louisiana
(CA-91-1312-D)

(Filed Jan. 13, 1994)

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:[1]

In issue is whether the district court abused its discretion in denying plaintiff's motion for voluntary dismissal and, concomitantly, granting defendant summary

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[1] Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

judgment and thereby dismissing plaintiff's claim with prejudice, where a dismissal without prejudice would not only have exposed defendant to litigation in another forum, but also would have stripped defendant of an affirmative defense. Finding no reversible error, we AFFIRM.

I.

Rosetta Hillary was a passenger on a TWA flight from Los Angeles, California, to St. Louis, Missouri, in March 1987. Hillary alleges that as she prepared to deplane in St. Louis, a TWA employee was removing a personal computer from an overhead bin above her seat; the computer fell, injuring her. Over four years later, in April 1991, Hillary sued TWA in federal district court in Louisiana, pursuant to diversity jurisdiction.[2]

TWA moved for summary judgment, asserting that Louisiana's one-year statute of limitations barred the claim.[3] In response, Hillary contended that, notwithstanding her filing suit in Louisiana, the "Only solution to [her] dilemma" was to attempt to use Missouri's five-

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[2] TWA has since filed for bankruptcy; the Bankruptcy Court in Delaware modified the automatic stay to allow Hillary to proceed, pursuant to a stipulation from Hillary that she would enforce any judgment she obtained only against TWA's insurers.

[3] Although the Louisiana statute is not identified, we assume that it is La. Civ. Code Ann. art. 3492 (West 1993), which provides, in relevant part: "Delictual actions are subject to a liberative prescription of one year. This prescription commences to run from the day injury or damage is sustained. . . . "

year statute of limitations, instead of Louisiana's.[4] In the alternative, Hillary moved for voluntary dismissal, under Fed. R. Civ. P. 41(a)(2), so that she could pursue her case in federal court in Missouri. At the same time, Hillary filed suit against TWA in federal district court in Missouri.

In a judgment entered in December 1991, the Louisiana district court granted TWA's motion for summary judgment, based on Louisiana's statute of limitations, and denied Hillary's motion for voluntary dismissal without prejudice. Accordingly, it dismissed her claim with prejudice.

II.

Rule 41(a)(2) states in pertinent part that:

> an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. . . . Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

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[4] Hillary conceded, however, that the district court in Louisiana had to apply Louisiana's statute of limitations, not Missouri's. In her memorandum in pposition to summary judgment, Hillary stated that she was "hardpressed [sic] to deny the correctness of defendant's position", *i.e.*, that the statute of limitations entitled TWA to summary judgment. She also stated that she realized that the court would "customarily apply the law of the forum to the issue of limitations in a diversity case . . . plaintiff can not refute the fact that Louisiana's prescriptive period has expired."

The district court's denial of a Rule 41(a)(2) motion is within its sound discretion; we review only for abuse of that discretion. *Phillips v. Illinois Cent. Gulf R.R.*, 874 F.2d 984, 986 (5th Cir. 1989). The only issue before us is such abuse of discretion *vel non*, concerning Hillary's motion being denied, with the result that her claim was dismissed with, rather than without, prejudice.

In denying Hillary's Rule 41(a)(2) motion, the district court cited *Phillips*, 874 F.2d 984. That case governs here, although Hillary urges us to follow the Eleventh Circuit's decision in *McCants v. Ford Motor Co.*, 781 F.2d 855 (11th Cir. 1986).

McCants held that, absent bad faith on the part of the movant or "plain legal prejudice" to the defendant, a motion to dismiss under Rule 41(a)(2) should be granted, and the case dismissed without prejudice. *Id.* at 858. The *McCants* court also stated that "the likelihood that a dismissal without prejudice will deny the defendant a statute of limitations defense does not constitute plain legal prejudice and hence should not alone preclude such a dismissa1."[5] *Id.*

In *Phillips*, however, this court discussed the quoted language from *McCants*, and reached a different result the result that TWA urges – that the loss of a statute of limitations defense *is* plainly prejudicial to the defendant,

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[5] Like the defendants in *McCants* and *Phillips*, TWA can use the statute of limitations to bar Hillary's claim in the state where the Rule 41(a)(2) motion was filed, but would not be able to do so in a second forum – here, Missouri, where the applicable statute is five years. Mo. Ann. Stat. § 516.120 (Vernon 1991).

making denial of the motion appropriate. *Phillips*, 874 F.2d at 987. *Phillips* stated:

> We agree that the mere prospect of a second lawsuit on the same facts is not sufficiently prejudicial to the defendant to justify denial of a Rule 41(a)(2) motion to dismiss. In this case, however, the facts in the second lawsuit would differ in that the defendant would be stripped of an absolute defense to the suit – the difference between winning the case without a trial and abiding the unknown outcome of such a proceeding. If this does not constitute clear legal prejudice to the defendant, it is hard to envision what would.

Id. (internal citation omitted); *but see id.* at 990 (Politz, J., dissenting); *see also Ikospentakis v. Thalassic S.S. Agency*, 915 F.2d 176, 178 (5th Cir. 1990) (discussing *Phillips*). This case presents us with the same situation – the potential that, absent a dismissal with prejudice, TWA will be stripped of its absolute defense of the statute of limitations.[6] Therefore, we find no abuse of discretion in the

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[6] The district court order contains language that seems to limit, or modify, the dismissal, so that it applies only to that court:

> This ruling. does not reach the merits of Plaintiff's claim, and this court expresses no opinion as to whether this matter can now be litigated in some other forum that does not apply the Louisiana prescriptive period. Accordingly,
>
> IT IS ORDERED that Defendant's Motion for Summary Judgment is hereby GRANTED, *dismissing Plaintiff's claim with prejudice in this court.*

(Emphasis added.)

As noted, Hillary states that she filed suit in Missouri when she filed her Rule 41(a)(2) motion in Louisiana. Of course, the district court in Missouri, not this court, controls that suit.

district court's denial of Hillary's motion for voluntary dismissal without prejudice, under the rule set out in *Phillips*.

III.

For the foregoing reasons, the judgment is **AFFIRMED**.

MINUTE ENTRY
McNAMARA, J.
NOVEMBER 27, 1991

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ROSETTA HILLERY	*	CIVIL ACTION
	*	
VERSUS	*	NO. 91-1312
	*	
TRANSWORLD AIRLINES, INC.	*	SECTION "D" (6)
	*	
	*	(Filed Dec. 2, 1991)

Before the court are (1) Defendant's Motion for Summary Judgment and (2) Plaintiff's Motion to Dismiss Without Prejudice. Each motion is opposed by the non-moving party. Both are before the court on briefs, without oral argument.

Plaintiff, who claims to be a Louisiana domiciliary, alleges that on March 16, 1987, she suffered an injury in St. Louis, Missouri, when an item of carry-on baggage, which was being removed from an overhead storage bin by Defendant's employee on Defendant's airplane, struck her on the head.

After a series of unsatisfactory experiences with attorneys in both Missouri and Louisiana, Plaintiff, through counsel, filed a Petition for Damages in this court on April 4, 1991, asserting that "The law of the state of Missouri is applicable to all aspects of this claim, as the State of Missouri was the situs of the accident." Petition for Damages, p.1.

Defendant moves for summary judgment on the grounds that "[t]he action is . . . time-barred due to the Louisiana prescription period of one year. Although plaintiff asserts that the law of Missouri governs all aspects of the claim, this is irrelevant given the long-standing maxim of the Fifth Circuit that statutes of limitation or prescriptive statutes are procedural in nature and are controlled by the law of the forum." Memorandum in Support of Motion for Summary Judgment, p.1 (citing *Rohde v. Southeastern Drilling Co.*, 667 F.2d 1215, 1219 (5th Cir. 1982)).

Plaintiff, in her brief on the subject motions, is "hard-pressed to deny the correctness of defendant's position" on the prescription issue. Memorandum in Opposition to Defendant's Motion for Summary Judgment, and in the Alternative, Motion for Voluntary Dismissal Without Prejudice, p.3. Plaintiff prays, however, that this court grant a voluntary dismissal without prejudice pursuant to Rule 41(a)(2) of the Federal Rules of Civil Procedure so that she may pursue her suit in Missouri, where the statute of limitations is five years and the suit would not be time-barred.

Defendant is correct that the Louisiana prescriptive period is applicable to actions litigated in this court under circumstances such as those in the instant case. *See Rohde, supra.* On that narrow issue, the only one before this court, defendant is entitled to summary judgment as a matter of law. *See* Fed. R. Civ. P. 56.

This ruling does not reach the merits of Plaintiff's claim, and this court expresses no opinion as to whether this matter can now be litigated in some other forum that

does not apply the Louisiana prescriptive period. Accordingly,

IT IS ORDERED that Defendant's Motion for Summary Judgment is hereby GRANTED, dismissing Plaintiff's claim with prejudice in this court. Plaintiff's Motion for Voluntary Dismissal Without Prejudice is hereby DENIED (*see Phillips v. Illinois Cent. Gulf R.R.*, 874 F.2d 984 (5th Cir. 1989)).

* * *

CLOSED

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ROSETTA HILLERY	*	CIVIL ACTION
	*	
VERSUS	*	NO. 91-1312
	*	
TRANSWORLD AIRLINES, INC.	*	SECTION "D" (6)
	*	

JUDGMENT

(Filed Dec. 2, 1991)

For the reasons set forth in the Minute Entry dated November 27, 1991, granting the Defendant's Motion for Summary Judgment, IT IS ORDERED, ADJUDGED AND DECREED that Final Judgment be and is hereby rendered in favor of Defendant Transworld Airlines, Inc. and against Plaintiff Rosetta Hillery, dismissing Plaintiff's Petition for Damages with prejudice in this court, because of the Louisiana prescriptive statute, at her costs.

New Orleans, Louisiana, this 27 day of November 1991.

/s/ A. J. McNamara
United States District Judge

Date of Entry DEC 3 1991